

REMARKS

Claims 1, 13, 23, 36, 46, 47, and 61 are amended herein. Upon entry of this amendment, claims 1, 4-13, 15, 16, 23-55 and 57-61 will be pending in this application.

**Rejection under 35 U.S.C. § 112**

Claim 46 has been amended herein to provide sufficient antecedent basis for the phrase "said body" and to delete the phrase "said mouthpiece body". Accordingly, applicants submit that claim 46, as presented herein, is in proper form and satisfies the requirements of 35 U.S.C. § 112. As a result, applicants respectfully request withdrawal of the rejection of claim 46 under 35 U.S.C. § 112.

**Rejections under 35 U.S.C. § 102(b) and 103(a)**

**Claim 1**

Claim 1 stands rejected as being obvious over Mault (U.S. Patent No. 6,468,222) in view of Sheehan (U.S. Patent No. 6,319,199). Claim 1, as amended herein, recites a breath testing device housing comprising:

a base to be gripped by an operator and having a front edge and an opposite back edge;

a display oriented on the back edge of the base and aligned with an operator's direct line of view while gripping said base;

a mouthpiece interface for interfacing with a removable mouthpiece, said mouthpiece interface oriented with respect to said base such that when the operator stands in front of the

subject and a subject blows into the mouthpiece, said display is not in the direct line of view of the subject;

a manual sample button located on the front edge of said base opposite the display; and

an alcohol sensor fluidly connected to the mouthpiece interface, the alcohol sensor being adapted to detect alcohol present in the subject by the subject blowing into the mouthpiece.

With respect to the rejection of claim 1 as being obvious in view of Mault and Sheehan, the cited prior art does not show or suggest the claimed alcohol sensor being adapted to detect alcohol present in the subject by the subject blowing into the mouthpiece. As admitted by the Office in the rejection, Mault discloses a calorimeter for measuring the metabolic rate of a subject, and Sheehan discloses a portable data collection device (i.e., a digital otoscopic camera) for diagnosing and data collection. Thus, neither of the cited references teach or suggest an alcohol detecting alcohol sensor. Moreover, a rejection under 35 U.S.C. § 103 is unsupportable unless accompanied by a clear articulation of the reasons why the claimed invention would have been obvious. See M.P.E.P. § 2141 citing *KSR International Co. v. Teleflex Inc.*, 550 U.S. \_\_\_, \_\_\_, 82 USPQ2d 1385, 1395-97 (2007). In this case, the Office has not provided any reasons as to why the claimed invention would have been obvious.

For at least the above reasons, claim 1 is believed to be nonobvious and patentable over Mault and Sheehan. Claims 4-12

depend from independent Claim 1 and are also patentable over the cited art.

**Claim 13**

Claim 13 stands rejected as anticipated by Lutz (U.S. Patent No. 4,274,425). Claim 13, as amended, recites a mouthpiece for a breath testing device, said mouthpiece comprising a body comprising a first end, a second end, said first end being open so that a subject can blow air into said mouthpiece, said second end being closed, said mouthpiece further comprising at least one port for channeling air blown into said mouthpiece into the breath testing device, a display, and a discard breath outlet oriented such that discard breath is not directed into the device or at an operator of the breath testing device during testing when the operator views the display, said mouthpiece having a cross-sectional shape being one of: a D-shaped cross-sectional shape and a V-shaped cross-sectional shape.

As illustrated in Fig. 1a of Lutz, Lutz discloses a mouthpiece having a generally circular cross-sectional shape. Thus, Lutz fails to teach or suggest a mouthpiece having either a D-shaped cross-sectional shape or a V-shaped cross-sectional shape. Accordingly, claim 13 is unanticipated by and patentable over Lutz. Claims 15-16 depend from independent Claim 13 and are also patentable over the art.

**Claim 23**

Claim 23 is rejected as anticipated by Mault. Claim 23, as amended, recites a breath tester housing assembly comprising:

a housing comprising a base, a display, and a mouthpiece interface, said base to be gripped by an operator during testing, said display oriented with respect to said housing to be in line with an operator's direct line of view while gripping said base;

a mouthpiece configured to be removably coupled to said mouthpiece interface, said mouthpiece comprising a body comprising at least one substantially planar surface, the mouthpiece interface including a stop for positively locating the mouthpiece, the mouthpiece being placed against the stop in a testing position; and

an alcohol sensor in fluid communication with the mouthpiece and mouthpiece interface, the alcohol sensor being adapted to detect alcohol present in a subject by the subject blowing into the mouthpiece.

As mentioned above, Mault is directed to calorimeter for measuring the metabolic rate of a subject. As a result, Mault fails to teach or suggest an alcohol sensor being adapted to detect alcohol present in a subject by the subject blowing into the mouthpiece as recited in claim 23. Accordingly, claim 23 is unanticipated by Mault. Claims 24-25 and 27-35 depend from claim 23 and are also patentable over Mault.

**Claim 36**

Claim 36 is rejected as anticipated by Mault. Claim 36, as amended, recites a breath tester housing assembly comprising:

a housing comprising a base and a display, said base to be gripped by an operator during testing, said display oriented with respect to said housing to be in line with an operator's direct line of view while gripping said base and while the operator stands in front of the subject in a sideways stance;

a mouthpiece configured to be removably coupled to said housing and to extend obliquely from said housing; and

an alcohol sensor in fluid communication with the mouthpiece and mouthpiece interface, the alcohol sensor being adapted to detect alcohol present in a subject by the subject blowing into the mouthpiece.

As mentioned above, Mault does not disclose an alcohol sensor being adapted to detect alcohol present in a subject by the subject blowing into the mouthpiece. Thus, the rejection of claim 36 under § 102(b) must be withdrawn. The rejection of claims 37-46, which depend from claim 36, must also be withdrawn.

#### **Claim 47**

Claim 47 is directed to a breath testing device mouthpiece, said mouthpiece comprising a first end, a second end, and a body extending therebetween, a portion of said body having a selected cross-sectional shape, said selected cross-sectional shape being one of: a D-shaped cross-sectional shape and a V-shaped cross-sectional shape, said body further comprising a passageway extending through said body from said first end towards said second end, said passageway for channeling air blown into said mouthpiece into the breath testing device.

Claim 47 stands rejected as anticipated by Mault. As admitted in the Office action, Mault does not disclose a mouthpiece having a D-shaped or V-shaped cross-sectional shape. The Office asserts, however, that the cross-sectional shape of the mouthpiece does not add patentable weight and is merely a design choice. Such an assertion is in error. As set forth in M.P.E.P. § 2143.03, all limitations of the claims must be considered and given weight. Thus, the specified cross-sectional shape of the mouthpiece must be given patentable weight. Accordingly, the Office's current position is unsustainable.

Applicants further point out that the Office supports its rejections of claim 47 as being anticipated by Mault under 35 U.S.C. § 102 by citing M.P.E.P. § 2144. However, M.P.E.P. § 2144 is directed to supporting rejections made under 35 U.S.C. § 103, and not 35 U.S.C. § 102. Thus, the Office's current rejection of claims 34 and 45 cannot be maintained.

Claims 48-53 depend from claim 47 and are submitted as patentable for the same reasons as claim 47.

#### **Claim 54**

Claim 54 is directed to a mouthpiece for a breath testing device. The mouthpiece comprises a body extending between a first end and a second end, said body comprising a first body portion, a second body portion, and a passageway defined at least partially within said first and second body portions, said first body portion extending from said first end to said second body portion, said second body portion extending from said second end to said first body portion, said passageway

substantially concentrically aligned with respect to said body and extending from said first end towards said second end for channeling air blown into said first end into the breath tester, at least one of said first and second body portions comprises at least one port extending between an external surface of said body and said passageway, said at least one port being defined within said first body portion for channeling discard breath air from said mouthpiece during testing, said at least one port is oriented with respect to said mouthpiece such that discard breath is not directed towards an operator of the breath testing device during testing.

Claim 54 stands rejected as being unpatentable over Mault in view of Hirsch (U.S. Patent No. 4,202,353). As recognized by the Office, Mault fails to teach or suggest a mouthpiece having at least one port oriented such that the breath of the subject is not directed towards an operator during testing. In view of these shortcomings of Mault, the Office relies on Hirsch, which also fails to teach or suggest a mouthpiece having such a port. As illustrated in Fig. 2 of Hirsch, the probe disclosed therein comprises a probe body 10 and a hygienic sheath 12 (or mouthpiece). With reference now to Fig. 3 of Hirsch, the breath outlet port is disposed on the probe body and not the sheath. The sheath does not have any ports for discharging breath. Thus, both Mault and Hirsch fail to teach or suggest a mouthpiece having at least one port that is oriented with respect to the mouthpiece such that discard breath is not directed towards an operator of the breath testing device during testing as recited in claim 54. As a

result, claim 54, as well as dependent claims 55 and 57-60, are believed to be patentable over the art.

**Claim 61**

Claim 61 is directed to a breath testing device housing comprising:

a base to be gripped by either hand of an operator and having a front edge and an opposite back edge;

a display oriented on the back edge and aligned with an operator's direct line of view while gripping the base;

a removable mouthpiece extending away from the display, the mouthpiece including at least one port for channeling air blown into the mouthpiece into the breath testing device and a discard breath outlet oriented such that discard breath is not directed at an operator of the breath testing device during testing when the operator views the display;

a mouthpiece interface for receiving the removable mouthpiece, the mouthpiece interface and mouthpiece oriented with respect to the base such that, when the operator holds the base in either hand and stands in front of the subject, and a subject blows into the mouthpiece, the display is not in the direct line of view of the subject; and

an alcohol sensor in fluid communication with the mouthpiece and mouthpiece interface, the alcohol sensor being adapted to detect alcohol present in the subject by the subject blowing into the mouthpiece.



Claim 61 stands rejected as being anticipated by Mault. As asserted above, Mault fails to teach or suggest an alcohol sensor being adapted to detect alcohol present in the subject by the subject blowing into the mouthpiece as recited in amended claim 61. Thus, claim 61 is unanticipated by and patentable over Mault.

#### **Response to Double Patenting Rejection**

Claims 13, 15, 16, 23-27, 47-55 and 57-61 have been rejected on the grounds of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-7 and 11-29 of U.S. Patent Application No. 11/089,655.

Applicants note this rejection is in fact a provisional obviousness-type double patenting rejection since U.S. Patent Application No. 11/059,655 has not yet issued as a patent. Applicants will address the merits of this rejection, as appropriate, if the listed application issues as a patent before the application at hand.

**Conclusion**

In view of the foregoing remarks and amendments, all the claims now in this application are believed to be in condition for allowance. Applicants respectfully request reconsideration and favorable action. The undersigned requests a telephone call from the Examiner if this might expedite allowance of the application.

The Commissioner is hereby authorized to charge the fee of \$120.00 for a one-month extension, \$810.00 for Request for Continued Examination, and any additional fees in connection with this Amendment B to Deposit Account Number 012384 in the name of ARMSTRONG TEASDALE LLP.

Respectfully Submitted,

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